AUDIOVOX COMMUNICATION (MALAYSIA) SDN BHD & ANOR

v.

MARINA ABDUL MAJID

HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH IBRAHIM JC
[CIVIL APPEAL NO: R2-12-541-2002]
16 AUGUST 2004

CIVIL PROCEDURE: *Judgment - Default judgment - Default of defence - Appeal against sessions court decision entering judgment in default of defence - Appellants also filed application to set aside said default judgment - Proper procedure to set aside a judgment in default of defence - Whether decision in Mohamad Nazri Ali v. Abdullah Sidek ought to be followed - Subordinate Courts Rules 1980, O. 49 r. 6(1)*

This was an appeal by the appellants against the decision of the sessions court to enter judgment in default of defence against them after the sessions court had denied the appellants' request for a short extension of time to file the statement of defence. In addition, the appellants had also filed an application to set aside the judgment in the sessions court although it had been stayed pending the outcome of this appeal. The appellants had taken this curious course of action due to the High Court decision of *Mohamad Nazri Ali v. Abdullah Sidek*, in which it was decided that the correct procedure to be taken by a defendant against a judgment in default of defence was to appeal to the High Court, and not by filing an application to set aside. Thus, the main issues requiring determination were whether the decision of *Mohamad Nazri Ali (supra)* ought to be followed and what was the proper procedure to be adopted by the appellants in the sessions court to set aside the judgment in default of defence entered against them.

Held:

[1] This court, with the greatest of respect, was unable to agree with the decision in *Mohamad Nazri Ali (supra)*. The learned judge in *Mohamad Nazri Ali (supra)* had decided that O. 49 r. 6 of the Subordinate Courts Rules 1980 ('the SCR') was the appropriate procedure, being primarily persuaded by O. 49 r. 6(1) of the SCR that appeared to provide a procedure to set aside the judgment in default of appearance. However, upon considering O. 49 r. 6 of the SCR holistically, it became clear that although it provided a procedure, it was not a proper or efficacious one

as it clearly envisaged that a decision that would be appealed to the High Court was one made by way of a written application with relevant affidavits (the rare exception would be an application pursuant to O. 14 r. 21(1)(a) of the SCR) and arguments heard on the relevant application. Where a judgment had been entered in default of defence, the only thing that would be in the record of appeal was the notice of appeal, the summons and statement of claim, the notice of appearance and perhaps the judgment. This, by itself, revealed nothing about what had transpired in the subordinate courts. A defendant would undoubtedly suffer prejudice and the appeal would amount to nothing more than an affirmation of the subordinate court judge's decision. (pp 373 a, 375 d-h & 376 a, e)

[2] In the subordinate courts, where a plaintiff had entered judgment in default of defence, the procedure to set it aside would be for the defendant to file an application with a supporting affidavit explaining why the statement of defence could not have been filed within the prescribed time period and to show a defence on the merits. Therefore, in the present case, appealing to this court to set aside the judgment in default of defence was clearly improper, and due to the peculiar circumstances of this case, this court struck out the appeal and ordered that the sessions court hear the appellants' pending application in the sessions court to set aside the default judgment, both on the grounds of whether the appellants had shown a defence on the merits and whether the default was irregular and ought to be set aside *ex debito justitiae.* (pp 377 e & 378 b-c)

[Ordered accordingly.]

Case(s) referred to:

Chin Choy & Ors v. Collector of Stamp Duties [1979] 1 MLJ 69 ***(refd)***
Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1 ***(refd)***
Goh Sook Kim & Satu Lagi lwn. Lee Wng Kooi & Satu Lagi [2001] 6 MLJ 751 HC ***(refd)***
L Oppenheim And Company v. Mahomed Haneef [1922] 1 AC 482 ***(refd)***
Mohamad Nazri Ali v. Abdullah Sidek [2000] 6 MLJ 355 HC ***(not foll)***
Ng Hee Thoong & Ors v. Public Bank Bhd [1995] 1 CLJ 690 ***(refd)***
Pegasus Engineers Sdn Bhd v. Sambu (M) Sdn Bhd [1998] 3 CLJ 677 ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Phua Lai Ong [1996] 3 CLJ 321 ***(refd)***
Soon Keng Sdn Bhd v. Low Chee Hoong & Ors [2001] 4 MLJ 238 ***(refd)***
Yeo Peck Chie v. KS Gill & Co [1946] MLJ 131 ***(refd)***

Legislation referred to:
Subordinate Courts Act 1948, s. 99, Sch 3
Subordinate Courts Rules 1980, O. 1 r. 4(1), O. 3 r. 5(3), O. 14 rr. 5(3), 21(1)(a), O. 19 rr. 2(1), 9, O. 24 r. 4(2)(a), O. 29 r. 14, O. 49 r. 6(1), (3), O. 53 r. 11

For the appellants - Mubashir Mansor (Tan Joon Ho with him); M/s Skrine
For the respondent - Rajadevan Vamadevan (Joseph Mathews with him); M/s Mathews & Assoc

Reported by Suresh Nathan

JUDGMENT

Wan Afrah Ibrahim JC:
The respondent filed a claim against the appellants in the Kuala Lumpur Sessions Court for misrepresentation and in the alternative, negligent misrepresentation, and claimed for specific damages amounting to RM64,916.42.

Brief Facts
The case was first fixed for mention on 14 June 2002. On that date the two appellants had their respective set of solicitors. Both of them attended court before the respondent's solicitors arrived and obtained another mention date to file the appellants' statement of defence. On 8 July 2002 the first appellant's solicitors took over conduct from the second appellant's solicitors. When the matter was called up on 22 July 2004, appellants' solicitors requested a short extension of time to file the statement of defence which they claimed was pending their client's approval. The Sessions Court Judge denied the appellants' solicitors request and at the respondent's behest entered judgment in default of defence against the appellants.

What the appellants have done here is to appeal against the Session Court's decision to enter judgment in default of defence. In addition, I was informed that the appellants have also filed an application to set aside the judgment in the Sessions Court although this had been stayed pending the outcome of this appeal. They have taken this curious course of action due to the High Court decision of *Mohamad Nazri bin Ali v. Abdullah bin Sidek* [2000] 6 MLJ 355.

Issues To Be Determined
Whether the court ought to follow the decision of *Mohd Nazri* [2000] 6 MLJ 355 and should the court disagree with the decision in *Mohd Nazri*'s case what is the proper procedure to be adopted by the appellants in the Sessions Court to set aside judgment in default of defence entered against them.

In the decision of *Mohamad Nazri* it was decided that the correct procedure to be taken by a defendant against a judgment in default of defence is to appeal to the High Court and not by filing an application to set aside. Having considered this decision, I am with the greatest of respect unable to agree with it.

The respondent also took the stand that the appellant cannot file an application to set aside the default judgment for irregularity in the Sessions Court and to appeal on the defence of merits in the High Court.

To my mind the waypoints in the reasoning behind *Mohamad Nazri* are as follows:

a) Judgment in default of defence was entered against the defendant pursuant to O. 14 r. 5(3) SCR. The learned judge noted, 'It is significant to observe that O. 14 contains no provision as to the setting aside (for varying) of an order made under para. (3).'

b) The learned judge referred to O. 29 r. 14 SCR and interpreted the effect of this provision to mean '... if, in respect of a judgment or order made by a subordinate court in respect of a civil matter, there is no provision in the Subordinate Court Rules for the setting aside (or the varying) of that order or judgment, as in the present case, then there is no recourse to setting aside (or varying) the same.'

c) Utilization of O. 1 r. 4 SCR to apply O. 19 rr. 2 and 9 RHC was held not to apply 'merely because the SCR does not contain any provision for the setting aside by the Magistrate's Court of its judgment given in default of defence, it cannot be said that there is a lacuna in the SCR. To my mind, it is axiomatic that the absence of a corresponding provision in the SCR *vis-a-vis* the provision in the RHC cannot be a sufficient basis for determining whether or not there is a lacuna in the SCR. As I see it, there is no lacuna at all in the SCR'.

d) Inherent jurisdiction of the court does not apply; therefore s. 99A SCA48 (read with 3rd Schedule) and O. 53 r. 11 SCR are not applicable because there is available procedure to set aside the decision.

e) The procedure is by way of an appeal pursuant to O. 49 r. 6 SCR.

Whilst I am in agreement that O. 14 r. 5 SCR does not contain a provision to allow for the setting aside of a judgment in default of defence, I with respect do not agree with the interpretation cast upon O. 29 r. 14 SCR in *Mohamad Nazri*.

A reading of O. 29 r. 14 SCR, uncluttered by any assumptions as to its intended effect, would show that it merely provides that where provisions are made for the setting aside or varying of an order or judgment then the applicant must make his application within 30 days of receipt of the judgment or order. This rule merely lays down time limitations where there are such enabling provisions. So where there are no such provisions in existence to set aside or vary an order or judgment, it simply means that no statutory or prescribed time limit applies.

However, that does not mean that where no prescribed time limit has been set, no time limit applies. The equitable doctrine of laches is always present to guard against sloth.

Order 29 r. 14 SCR cannot be interpreted to have such an effect because the provision is not worded in such a fashion and does not imply such an effect; see *Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 69 at p. 70 and *Yeo Peck Chie v. KS Gill & Co* [1946] MLJ 131 at p. 133. To interpret it in such a manner would be contrary to the manner in which the courts usually interpret procedural rules because it would increase the costs of litigation, if not prejudice the respondent altogether; see *Goh Teng Hoon & Ors v. Choi Hon Ching* [1987] 1 MLJ 95 and O. 1 r. 4(2) SCR. This prejudice against the respondent that I allude to will become clearer in the later part of my judgment. My view turns on O. 29 r. 14 SCR. I now turn to O. 1 r. 4(1) SCR which provides as follows:

> (1) In any matter of procedure or practice not provided for in these rules, the procedures and practice for the time being in use or in force in the High Court shall, as near as may be, be followed and adopted.

A lacuna is defined as 'an empty space or a missing part; a gap'; see *The American Heritage ® Dictionary of the English Language*; Fourth Edition. In law a lacuna is said to have arisen when there is a gap or lack of procedures or law governing something. It therefore appears obvious to me that O. 1 r. 4(1) SCR is intended to be used when there is a procedural lacuna.

I think that the lack of any rules providing the procedure to set aside a judgment in default of defence in the subordinate courts is a good example of a procedural lacuna. It is noted that whilst the learned judge admits that there are no provisions for such a procedure, he then proceeds to deny that there is a procedural lacuna present.

His Lordship however gives no persuasive reason for explaining why this glaring lack of procedure in respect of setting aside a judgment in default of defence does not amount to a lacuna. All that is said on this matter is that just because there is a provision in the RHC when there is none in the SCR 'cannot be a sufficient basis for determining whether or not there is a lacuna in the SCR.' However, his Lordship does not set out any guidelines as to how one is supposed to determine whether there is a lacuna in the SCR.

I would therefore agree with the respondent's submission that O. 1 r. 4(1) SCR read together with O. 19 rr. 2(1) and 9 RHC is applicable as there is a procedural lacuna where the setting aside of the judgment in default of defence is concerned. However, I would tend to agree with the learned judge that there is no resort to the inherent jurisdiction of the court to facilitate such a setting aside application.

Now the learned judge has decided that O. 49 r. 6 SCR is the appropriate procedure and I gather that his Lordship was persuaded primarily by O. 49 r. 6(1) SCR which provides as follows: 'Notwithstanding anything contained in this order, an appeal from any decision other than a decision made after trial by the court shall lie to a judge in chambers of the High Court.'

Seen in that manner O. 49 r. 6(1) SCR appears to provide a procedure to set aside the judgment in default of defence. However the provision should not be understood merely on its sub-rule. I think that O. 49 r. 6 SCR should be considered holistically. When this is done, it becomes painfully clear why although O. 49 r. 6 SCR provides a procedure, it is not a proper or efficacious one.

If O. 49 r. 6(3) SCR is observed, it envisages that the record of appeal 'shall' contain the application for the decision, the pleadings filed the relevant affidavits and the order. The use of the word 'and' between sub-paragraphs (c) and (d) of O. 49 r. 6(3) SCR is also important.

The use of the word 'and' implies conjunctivity and means that all the documents have to be included; see *Pegasus Engineers Sdn Bhd v. Sambu (M) Sdn Bhd* [1998] 3 CLJ 677. The use of the word 'shall' indicates that the presence of these documents are mandatory; see *Perbadanan Nasional Insurans Sdn Bhd v. Phua Lai Ong* [1996] 3 CLJ 321.

What this clearly envisages is that a decision that would be appealed to the High Court is one made by way of a written application with relevant affidavits (the rare exception would be an application pursuant to O. 14 r. 21(1)(a) SCR) and arguments heard on the relevant application.

Where a judgment has been entered in default of defence, the only thing that would be in the record of appeal is the notice of appeal, the summons and statement of claim, the notice of appearance and perhaps the judgment. This by itself reveals nothing about what transpired in the subordinate courts. It should also be noted that an appeal against such a decision would not satisfy the record of appeal requirements.

Assuming for a moment that this is the correct procedure, there would be no basis for a defendant to argue the impropriety of the subordinate court judge's discretion because firstly, the record of appeal under O. 49 r. 6 SCR does not include the notes of proceedings or grounds of judgment; and secondly, anything factual said by the defendant or his counsel would be tantamount to giving evidence from the Bar and this is not allowed, see *Ng Hee Thoong & Ors v. Public Bank Berhad* [1995] 1 CLJ 690.

A defendant would therefore be prohibited from arguing anything because there are no affidavits and would be unable to show cause why the statement of defence could not have been filed at the appointed time or whether he has a defence on the merits. This prohibition arises because there are no supporting affidavits for the court to peruse and provide a basis in the exercise of its discretion.

A defendant undoubtedly suffers prejudice and the appeal amounts to nothing more than an affirmation of the subordinate court judge's decision. This is why I must confess to being nonplussed as to why the appellants' solicitors argued that O. 49 r. 6 SCR is the correct procedure to adopt to set aside a judgment in default of defence.

Of cause it may be argued that the appellants can still sneak their supporting affidavits in by filing an application for stay of execution or the like and including the facts they think pertinent in the supporting affidavit; and then thereafter filing a notice of intention to use those affidavits. In fact, this is how the appellants tried to include their affidavits into the hearing of this appeal.

As ingenious as this tactic appears to be and as 'appropriate' as O. 49 r. 6 SCR may be said to be, I cannot help but feel that to make this the procedure with which to set aside a judgment in default in the lower court would be time consuming, cost wasting and prejudicial to a defendant. It would also make a mockery out of O. 1 r. 4(2) SCR which is the guiding principle in interpreting procedural rules.

In any event, in an appeal under O. 49 r. 6 SCR, a judge should only decide on the issues that are contained in the record of appeal and cannot refer to anything else. If any other evidence, affidavit or otherwise, is sought to be brought before the appeal, then it must first satisfy the requirements in O. 49 r. 6(4) SCR. This cannot be circumvented with a mere notice of intention to use affidavits in an application filed in the same suit.

Although there were no serious arguments canvassing whether or not the Sessions Court Judge was *functus officio* in hearing an application to set aside a judgment in default, I think it relevant for completeness sake to conclude that I am of the view that it would not apply. This is because a default judgment is never obtained on the merits (see *Goh Sook Kim Dan Satu Lagi lwn. Lee Wng Kooi Dan Satu Lagi* [2001] 6 MLJ 751 and also *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1 which cited *L Oppenheim And Company v. Mahomed Haneef* [1922] 1 AC 482 approvingly) nor was any evidence led (and even if it was, it still can be set aside (see *Soon Keng Sdn Bhd v. Low Chee Hoong & Ors* [2001] 4 MLJ 238).

Therefore in the subordinate courts, where a plaintiff has entered judgment in default of defence, the procedure to set it aside would be for a defendant to file an application with a supporting affidavit explaining why the statement of defence could not have been filed within the prescribed time period and to show a defence on the merits. Needless to say, such an application should be filed as soon as reasonably possible.

However, ideally, what should be done in this case is for the appellant's lawyers to call the respondent's lawyers before the prescribed time limit for filing a defence and ask whether they have any objection to a further extension of time. If the respondent's lawyers are agreeable then they can invoke O. 3 r. 5(3) SCR.

If the respondent's lawyers have indicated that they are not agreeable with such an extension of time or give no indication whether or not they agree, then the appellant's solicitors should proceed to immediately file an application for an extension of time to file the statement of defence. They should not risk coming to court and applying orally for an extension of time because the Sessions Court Judge is not obliged to allow it.

There is no excuse why such an application for extension of time could not have been filed earlier. A foreseeable argument is that it takes time for the appellant's solicitors to prepare the supporting affidavit for the application. However, this argument would be without merit because the application can be filed first and the supporting affidavit later; see O. 24 r. 4(2)(a) SCR.

If this were done, then I feel certain the occurrences of an application to set aside a judgment in default of defence would be significantly reduced.

Much argument has been made by the parties about the merits of the defence but at present it is unnecessary for me to consider the same. Appealing to this court to set aside the judgment in default of defence is clearly improper, and due to the peculiar circumstances of this case, I would therefore strike out the appeal, and order that the Sessions Court hear the appellants' pending application in the Sessions Court to set aside the default judgment, both on the ground of whether the appellants have shown a defence on the merits and whether the default is irregular and ought to be set aside *ex debito justitiae.* Each party to bear its own costs.